Supreme Court of Minnesota.

STENSGAARD *v.* SMITH.

In a contract between a real estate broker and his principal there must be mutuality; therefore, where the contract is unilateral, or merely amounts to an authority to sell, without imposing any obligation upon the broker, he must show a sale in pursuance of such authority, before he can recover his commissions, or other compensation.

So long as such an instrument remains a mere present authorization to sell, without contract obligations having been fixed, it is revocable by the principal.

This was an action for damages for a breach of contract, begun in the District Court of Ramsey County, Minnesota, August 25, 1887, and tried before the Hon. WILLIAM LEWIS KELLY, March 13 and 14, 1889. At the close of the plaintiff's testimony, upon the defendant's motion, the Court instructed the jury as follows:

This action is based upon the following written instrument:

ST. PAUL, MINN., Dec. 11, 1886.

In consideration of L. T. Stensgaard agreeing to act as agent for the sale of the property hereinafter mentioned, I have hereby given to said L. T. Stensgaard, the exclusive sale, for three months, of the following described property, to wit: Lots 3 and 4, block 49, Addition, Kittson's Addition to St. Paul. Size, 50x100 each; price, $17,000; incumbrance, none, terms, $5,000 cash, balance three and five years, interest 7 per cent. per annum payable annually. Improvements. And for which I authorize him to execute and deliver a contract for a warranty, which I agree to furnish as per this contract, and also to furnish an abstract to purchaser without delay. I further agree to pay said L. T. Stensgaard, a commission of 2½ per cent on the first two thousand dollars, and 2½ per cent. on the balance of the purchase price, for his services rendered in sale of above mentioned, whether the title is accepted or not,and also whatever he may get or obtain for said property over $17,000, when said property is sold.

Witness my hand, the day and year above mentioned.

JOHN SMITH.

JAMES G. NELSON.

It appears in evidence that this paper was signed and delivered by the defendant to the plaintiff about the day of its date, and that the plaintiff thereafter took certain steps, by advertising the property, to effect a sale of it. It appears also that he did not effect any sale of it, but that about the twelfth of January, 1887, the defendant, John Smith, himself sold the

property and conveyed it to a third party, thus terminating the agency as far as his connection in the matter.

Now, the defendant moves upon this evidence, for an instruction from the Court, for judgment upon the ground that the evidence shows that the plaintiff is not entitled to recover.

It is argued here that this is a contract of hiring, and a number of cases have been cited to the Court which undoubtedly contain good law, that where there has been a contract of hiring, and where the servant enters upon his duty, or stands willing and ready to enter upon his duty, and is prevented by the act of the master, that although the contract may in a certain sense be said to be unilateral, that the servant can recover for the reasonable value of his services.

I do not think this is a contract of hiring. I think, if it is anything, it is a contract upon the part of Stensgaard, if it is a contract at all upon his part, it would be a contract upon his part to sell that property, and a contract upon the part of the other party to pay Stensgaard for his services in selling the property a certain commission and all that might be obtained for it above $17,000. Now, it appears the Mr. Stensgaard did not sell the property. It is true that he claims that he did not sell it, because the defendant sold it before him. The contract upon its face is unilateral; it is not mutual. The facts in this case, I am satisfied, do not warrant a recovery.

In the case of *Fairchild* v. *Rogers* (1884), 32 Minn. 269, which is relied upon here as authority, the agent who was permitted to recover there for a sale which he could have made but for the action of his principal, had paid $200 for the privilege of having the exclusive sale of that property during a specified time; it was a valuable consideration. The plaintiff in this case was obligated to do nothing. He could shut up his real estate office, if he chose, the day after this contract was made, and keep it shut until it expired, and there would be no remedy whatever for the defendant; he could not recover upon it.

Now, as I have said, I do not think it is a contract of hiring, and therefore I distinguish the case from the case of *Horn* v. *The Land Company* (1875), 22 Minn. 233, and other cases that have been cited. I think the case comes squarely within the doctrine laid down in *Bailey* v. *Austrian* (1873), 19 Minn. 465; *Tarbox* v. *Gotzian* (1873), 20 Id. 139, and *Andreas* v. *Holcomb* (1876), 22 Id. 339. In the case of *Andreas* v. *Holcomb*, the case was almost *verbatim* like the one at bar, but which the Supreme Court held was not binding at all upon the Andreas Atlas Company, but that they, having performed it fully, the plaintiff had a right to recover. If this was a case where, before the revocation of the contract by Smith, the plaintiff had shown that he had effected a sale of the property, then there would have been no doubt about the plaintiff's right to recover.

Upon the evidence in this case, and the law, as I understand it, I instruct you, gentlemen, the defendant is entitled to a verdict.

The verdict being rendered for the defendant, and the Court refusing to grant a new trial, the plaintiff appealed.

O. H. Hubbard and *John W. Willis* [who kindly furnished us with the record and briefs] for appellant.

Kueffner and Fauntleroy for respondent.

DICKINSON, J., February 17, 1890. This action is for the recovery of damages for breach of contract. The rulings of the Court below, upon the trial, were based upon its conclusion that no contract was shown to have been entered into between these parties. We are called upon to review the case upon this point. The plaintiff was engaged in business as a real estate broker. On the eleventh of December, 1886, he procured the defendant to execute the following instrument, which was mostly in printed form. [Here follows a copy of the contract as above set forth.]

The evidence showed that the plaintiff immediately took steps to effect a sale of the land, posted notices upon it, published advertisements in newspapers, and individually solicited purchasers. About a month subsequent to the execution by the defendant of the above instrument, he himself sold the property. This constitutes the alleged breach of contract for which a recovery of damages is sought.

The Court was justified in its conclusion that no contract was shown to have been entered into, and hence that no cause of action was established. The writing signed by the defendant did not of itself constitute a contract between these parties. In terms indicating that the instrument was intended to be at once operative, it conferred present authority on the plaintiff to sell the land, and included the promise of the defendant that, if the plaintiff should sell the land he should receive the stated compensation. This alone was no contract, for there was no mutuality of obligation, nor any other consideration for the agreement of the defendant. The plaintiff did not by this instrument obligate himself to do anything, and therefore the other party was not bound: *Bailey* v. *Austrian* (1873), 19 Minn. 535; *Tarbox* v. *Gotzian* (1873), 20 Id. 139. If, acting under the authority thus conferred, the plaintiff had, before its revocation, sold the land, such per-

formance would have completed a contract, and the plaintiff would have earned the compensation promised by the defendant for such performance: *Andreas* v. *Holcomb* (1876), 22 Minn. 339; *Ellsworth* v. *Southern Minnesota Railway Extension Co.* (1884), 31 Id. 543. But so long as this remained a mere present authorization to sell, without contract obligations having been fixed, it was revocable by the defendant.

The instrument, does, it is true, commence with the words: "In consideration of L. T. Stensgaard agreeing to act as agent for the sale of the property," &c.; but no such agreement on the part of the plaintiff was shown on the trial to have been actually made, although it was incumbent upon him to establish the existence of a contract as the basis of his action. This instrument does not contain an agreement on the part of the plaintiff, for he is no party to its execution. It expresses no promise or agreement except that of the defendant. It may be added that the language of the "consideration" clause is not such as naturally expresses the fact of an agreement having been already made on the part of the plaintiff. Of course, no consideration was necessary to support the present, but revocable, authorization to sell. It is difficult to give any practical effect to this clause, in the construction of the instrument. It seems probable, in the absence of proof of such an agreement, that this clause had no reference to any actual agreement between those parties, but was a part of the printed matter which the plaintiff had prepared for use in his business, with the intention of making it effectual by his own signature. If he had appended to this instrument his agreement to accept the agency, or even if he had signed this instrument, this clause would have had an obvious meaning.

This instrument, executed only by the defendant, was effectual, as we have said, as a present, but revocable, grant of authority to sell. It involved, moreover, an offer on the part of the defendant to contract with the plaintiff that the latter should have, for the period of three months, the exclusive right to sell the land. This action is based upon the

theory that such a contract was entered into; but, to constitute such a contract, it was necessary that the plaintiff should in some way signify his acceptance of the offer, so as to place himself under the reciprocal obligation to exert himself during the whole period named to effect a sale. No express agreement was shown. The mere receiving and retaining this instrument did not import an agreement thus to act for the period named, for the reason that, whether the plaintiff should be willing to take upon him that obligation or not, he might accept and act upon the revocable authority to sell expressed in the writing; and, if he should succeed in effecting a sale before the power should be revoked, he would earn the commission specified. In other words, the instrument was presently effectual, and of advantage to him, whether he chose to place himself under contract obligations or not. For the same reason the fact that for a day or a month he availed himself of the right to sell conferred by the defendant, by attempting to make a sale, does not justify the inference, in an action where the burden is on the plaintiff to prove a contract, that he had accepted the offer of the defendant to conclude a contract covering the period of three months, so that he could not have discontinued his efforts without rendering himself liable in damages. In brief, it was in the power of the plaintiff either to convert the defendant's offer and authorization into a complete contract, or to act upon it as a naked revocable power, or to do nothing at all. He appears to have simply availed himself for about a month of the naked present right to sell, if he could do so. He cannot now complain that the landowner then revoked the authority, which was still unexecuted.

It may be added that there was no attempt at the trial to show that the plaintiff notified the defendant that he was endeavoring to sell the land; and there is but little, if any, ground for an inference from the evidence that the defendant in fact knew it. The case is distinguishable from those where, under a unilateral promise, there has been a performance by the other party of services, or other thing to be done, for which, by the terms of the promise, compensation

was to be made. Such was the case of *Goward* v. *Waters* (1868), 98 Mass. 596, relied upon by the appellant as being strictly analogous to this case. In the case before us, compensation was to be paid only in case of a sale of the land by the plaintiff. He can recover nothing for what he did, unless there was a complete contract; in which case, of course, he might have recovered damages for its breach. Order affirmed.

There has been much litigation upon the right of a real estate broker to receive payment of his commissions, the principal case being one of many that have recently occupied the attention of the courts.

The peculiarity of the contract therein entered into between the landowner and the broker suggests, perhaps more than any of the other cases, for consideration, the question: When, and under what circumstances, is a real estate broker entitled to receive his commissions from his employer? This question is thus answered by Story in his work on Agency: "§ 329. The general rule of law, as to commissions undoubtedly is, that the whole service or duty must be performed, before the right to any commissions attaches, either ordinary or extraordinary; for an agent must complete the thing required of him, before he is entitled to charge for it."

From this answer and general statement of the law, the question naturally presents itself: When may the thing required of him be said to be completed? Or, in other words, When, and at what time, has he performed his part of the contract? Must the transaction in which he is interested, be fully completed and ended in all respects, before he is entitled to be paid, or is the mere fact of his having found or introduced a purchaser, having brought the parties together, without further action or interference on his part, sufficient?

The real answer to these questions must lie in the engagement entered into in each particular case, for the agent must comply with the terms of the original contract. This is shown by the recent case of *Shultz* v. *Griffin* (1890), 121 N. Y. 294, where Shultz was employed by Griffin to make sale and dispose of a farm for a specified price, to be paid in the manner indicated in the written agreement signed by Griffin, for which sale Shultz was to receive a certain commission, and to have the exclusive sale for twenty days. Within the time specified, Shultz procured a person to sign a contract as purchaser. The contract, however, varied in its terms of payment from the terms mentioned in the original contract between Shultz and Griffin, and, consequently, Griffin refused it, and sold the property to another. In reversing the plaintiff's judgment, Justice ANDREWS said: "The burden was upon the plaintiff to show that the contract with Longnecker [the purchaser] was such a one as was authorized by the agreement with Griffin."

The same principle is declared in *Blumenthall* v. *Goodall*, de-

cided in the Supreme Court of California, December 6, 1890, where the contract was to be in force for ten days from its date, and was duly dated and signed. On the day of the date of the contract, the agent procured a party willing to purchase upon certain terms, among them a stipulation that he should be allowed thirty days to examine the abstract. This was objected to by the vendor, and, on the purchaser saying he would examine it earlier, if possible, he received and receipted for the abstract, but no time for its return was mentioned. Later in the same day, the owner received a letter from another party stating that he had purchased from the agent, and thereupon the owner gave written notice to the first purchaser and the agent revoking the authority to sell, and alleging that it had been procured through misrepresentation. In affirming defendant's judgment, Justice FOX said: "Goodall had the right to revoke the authority given * * at any time before complete performance. * * Up to the time of the revocation in this case, there had been no performance on the part of [the agent]. Performance on his part, to entitle him to his commissions, would have been the production of a purchaser, then ready and willing to make the purchase upon the terms embraced in the authority. No such purchaser had been found and produced when the authority was revoked. Neither of those who are claimed to have been such, had up to that time signified their willingness to take the property unconditionally upon the terms proposed." From this judgment, however, Justices WORKS and THORNTON dissented.

In *McPhail* v. *Buell*, decided also in the Supreme Court of California, December 15, 1890, the agreement was that the defendant would pay the plaintiff, when the vendees paid to him (the defendant) a sum on account, and executed to him their notes and a mortgage for the balance. The notes and mortgage were executed, but the money on account was not paid, although the time was extended, and the defendant was finally compelled to take back the property. Here Justice WORKS held that "Their [the purchasers'] failure to pay the money was a complete bar to any claim of the appellant to commissions," and affirmed the defendant's judgment. To the same effect, *Thomas et al.* v. *Lincoln* (1880), 71 Ind. 41; *Hoyt* v. *Shepherd et al.* (1873), 70 Ill. 309; *Harwood et al.* v. *Triplett* (1889), 34 Mo. App. 273.

The same rule applies in the case of a broker employed to effect an exchange of property; the minds of the parties must meet. Thus in *Rockwell* v. *Newton* (1877), 44 Conn. 333, where the action was to recover brokerage upon a contract made between the parties, whereby the defendant agreed to give the plaintiff a certain sum if he would procure an exchange of land upon satisfactory terms. The plaintiff introduced one Smith to the defendant; terms were arranged between the parties, the plaintiff was instructed to prepare the deeds and necessary papers (which he did), and Smith was ready to fulfill his part, but the defendant refused to perform his, and that, without assigning any reason. The Court below found for the plaintiff, but its judgment was reversed on appeal, Justice PARDEE saying: "Inasmuch as no exchange was in fact

effected for the reason that the minds of the parties did not meet upon any common point, we think that the plaintiff has never performed the condition precedent upon which his right to recover brokerage rests."

Not only must the agent or broker comply with the terms of the original contract by bringing the parties together, where his contract is to procure a purchaser, but he must show that such person is a purchaser, not a party who has a mere offer to make. He must produce a person who is able, ready and willing to complete the contract in every respect, according to its terms and conditions, and prove that it was through his efforts, upon his introduction, that the sale was effected, or in other words, he must show that he was the *causa causans* for such sale.

This principle is supported by the Supreme Court of the United States in *McGavock* v. *Woodlief* (1858), 20 How. (61 U. S.) 69, hereinafter more fully cited upon another point, where the Court expressed the rule thus: "The broker must complete the sale; he must find a purchaser in a situation, and ready and willing to complete the purchase on the terms agreed on, before he is entitled to his commissions." The same doctrine is held in *Birmingham Land and Loan Co.* v. *Thompson* (1888), 86 Ala. 146, by Chief Justice STONE in these words: "The office of a real estate broker, who is employed to negotiate sales of property, is that he should find a purchaser able and willing to buy; and that he should be the efficient cause of bringing the minds of the proposed purchaser and would-be vendor together. When this is done, the office of the real estate broker has been performed, and he has earned his commission. * * He has fully performed his part of the transaction, when he has secured a purchaser, able and willing to buy. His office has ceased, and his commission is earned."

In *Keys* v. *Johnson* (1871), 68 Pa. 42, Justice SHARSWOOD thus states the law: "Brokers are persons whose business it is to bring buyer and seller together. They need have nothing to do with the negotiation of the bargain. A broker becomes entitled to his commissions whenever he procures for his principal a party with whom he is satisfied, and who actually contracts for the purchase of the property at a price acceptable to the owner. He must establish his employment as broker, either by previous authority, or by the acceptance of his agency and the adoption of his acts, and also must prove that his agency was the procuring cause of the sale."

The same principle is held in *Illinois*, where *Short* v. *Millard* (1873), 68 Ill. 292, was an action to recover for services as agent, resulting in a judgment for the plaintiff. The defendant had agreed that if the plaintiff would find a purchaser for a piece of land, he would pay him a given sum. The plaintiff procured a purchaser, and the sale was consummated. It was alleged in defense, that the plaintiff acted as agent for both parties without notice to the defendant. It was proved, however, that this was not so until after the sale was closed. In affirming the judgment the Court said: "There is no doubt that appellee was the agent of appellant in procuring a purchaser, * * when he had fully performed

the agency, and it was at an end, he then received a retainer from the purchaser to see that the papers were properly prepared and executed. In this we perceive nothing wrong or inconsistent. * * * When he found the purchaser he was no longer the agent of appellant, and was free."

In *Bash et al.* v. *Hill et al.* (1871), 62 Ill. 216, the Court below instructed the jury that if they found upon the evidence that the defendants agreed with the plaintiffs that if the plaintiffs would assist them in making a trade in real estate, the defendants would pay plaintiffs a certain sum; and if the jury further found that the plaintiffs, relying upon such agreement, did assist, and such trade was in fact made, plaintiffs were entitled to recover. On appeal, Justice WALKER in affirming the judgment, said: "We perceive no error in the instruction given by the Court. * * It states the law of the case correctly, and could not have misled the jury." The defendants in this case sought to free themselves from responsibility upon the ground (*inter alia*) that a change in the terms of sale had occurred. On this point the Court held that, "Appellants [the defendants], having engaged the services of appellees, should, if they desired to dispense with their services, have given them notice. On the contrary, they seem to have omitted to do so, thus availing themselves of their services, and when a trade is made they refuse to compensate them."

In *Davis* v. *Gassette* (1889), 30 Ill. App. 41, the plaintiff solicited from the defendant the sale of property. The defendant consented, and the plaintiff finally brought one Partridge to look at the property, but no sale was effected, and the property was not afterwards called to Partridge's attention by the plaintiff. Subsequently another broker commenced negotiations between the defendant and Partridge, for an exchange of their respective properties, and a contract was made. The plaintiff claimed his commission, on the ground that the defendant gave him the exclusive agency for the sale of the property, and that he first offered the property to Partridge. In giving judgment for the defendant, Justice MORAN said: "It is, in our opinion, very clear * * that appellee [plaintiff] did not earn commissions by the performance of his contract. His agency was to sell the property at a specified sum. It would be absurd to say that he could earn his commission by bringing to his principal a customer with a mere offer to trade for the property. * * * The fact that appellee [plaintiff] first called Partridge's attention to the property cannot be held, as it seems to us, to have contributed proximately to the subsequent trade between the parties. All the attempts on the part of appellee [plaintiff] to induce Partridge to purchase the property had ceased. * * The fact that a sale or exchange of the property is finally brought about by the efforts of the principal or another broker with a person with whom the first broker had previously negotiated without success, will not furnish a legal basis for a claim for commissions by the first broker, especially when it appears that the first broker has for a long time ceased negotiations with the purchaser, and abandoned all efforts to induce him to take

the property on the proposed terms. * * In order to be entitled to commissions, it is indispensable that the broker should show that he has produced a purchaser, ready and willing to take the property on the terms specified, or that his efforts were the procuring cause of the sale which the principal has made to the purchaser with whom he has been brought into communication."

In *Van Gorder* v. *Sherman*, decided in the Supreme Court of Iowa, October 25, 1890, the plaintiff was to have one year to find a purchaser for defendant's property for a certain price in cash, and was to receive all he got above that sum as and by way of commission. He procured a purchaser for a larger amount, who was to pay the given price in cash, and the balance to the plaintiff on time. The defendant sold the land to another. The Court found that the plaintiff had found a purchaser able, ready and willing to purchase and pay for the land, and therefore affirmed the judgment for his commissions. The case of *Dent* v. *Powell et al.*, decided in the Supreme Court of Iowa, June 3, 1890, also shows that the purchaser must be a person able, ready and willing to take the property upon the terms agreed.

The case of *Pearson* v. *Mason* (1876), 120 Mass. 53, was an action in contract, the plaintiff alleging that he sold to the defendant certain land and shares, and received in payment certain other shares; that the defendant at the time, in consideration of the sale, agreed to buy other shares, and upon request pay for them; that plaintiff had offered to sell and assign the shares, and had demanded payment, but defendant refused and neglected to pay. It was further alleged that the defendant agreed, that if the plaintiff would introduce the defendant to anyone who would trade with him for certain other property, defendant would pay plaintiff a certain other sum; that plaintiff did introduce a party who traded with him therefor. At the trial in the Court below, the defendant requested the judge to instruct the jury "that a real estate broker is not entitled to his commission, as a matter of law, until the trade is completed and the papers passed; that the mere signing an agreement to exchange property, which is never carried out, does not entitle a broker, who introduces the parties, to his commission," and the judge stated that this might be true as a general rule, but refused to give such instruction. He instructed them, however, that "it was no matter in this case whether the agreement was complied with by the purchaser or not; that, if the contract between them was as the plaintiff had testified to, that is, if he was simply to introduce to the defendant a purchaser with whom the defendant was to make the trade, and he did so introduce him, and an agreement was made between them which bound the purchaser, the plaintiff's work was performed, and he was entitled to his commission." The jury found for the plaintiff, and in affirming their verdict Justice AMES said: "In the defendant's * * prayer for instructions, the general rule as to a broker's right to charge commissions may have been correctly stated, but the plaintiff's claim rests upon an alleged special contract upon the subject of his compensation, and the jury were correctly instructed that, if such con-

tract were proved, he was entitled to the commission as agreed."

The recent case of *Scribner* v. *Hazeltine*, (1890), 79 Mich. 370, further illustrates the rule that the plaintiff suing for commission for the sale of real estate must show that "he procured a customer ready and willing to enter into a contract on the vendor's terms, whether those which were originally fixed, or such as defendant [the vendor] found acceptable," before he can recover. So it must be shown that the purchaser made "a clear, plain acceptance of [the broker's] offer at the time," without which plaintiff cannot "show that he procured a purchaser," and "the testimony of [the purchaser] that he intended to take" the property for a certain figure "if he could get the whole of it, untrammeled by any conditions," will not suffice: *Hannan* v. *Fisher*, decided in the Supreme Court of Michigan, August 1, 1890.

The same is the doctrine in *Minnesota*. The agent employed to find a purchaser is only "entitled to his commissions when he procures a purchaser able, willing and ready to complete the purchase on the terms stipulated" If, however, he is not successful in obtaining a consent to a definite proposition, he cannot recover: *Cullen* v. *Bell* (1890), 43 Minn. 226; *Hamlin* v. *Schulte* (1886), 34 Id. 534; *Armstrong* v. *Wann* (1882), 29 Id. 126.

In the recent case of *Francis et al.* v. *Baker*, decided in the Supreme Court of Minnesota, December 17, 1890, Justice MITCHELL said: "Where a person agrees with a real estate broker to pay him a commission if he procures a purchaser for his property on specific terms, the broker, in order to entitle him to his commission, is bound to present a purchaser who is ready, able and willing to buy on the proposed terms, and the principal is not bound to accept a proposed purchaser unless he is able to perform the contract on his part according to the proposed terms. But it is for the principal then to decide whether the person presented is acceptable: and if, without any fraud, concealment, or other improper practice on [the] part of the broker, the principal accepts the person presented, either on the terms previously proposed or upon modified terms then agreed upon, and enters into a binding and enforceable contract with him for the purchase of the property, the commission is fully earned. The party presented is then a purchaser, within the meaning of the contract between the principal and the broker, although the sale is not completed or executed by payment of the consideration to the vendor." Here, the Maryland cases: *Richards, Ex'r, &c.* v. *Jackson* (*infra*, page 128), and *Kimberly* v. *Henderson and Lupton* (Id.), were relied upon in defense, but the Court pointed out that the former case "might have been decided upon the ground that the party presented had never entered into any enforceable contract of purchase, the written agreement containing a provision giving him the option to release himself of all liability by paying a sum of money as a forfeit;" and added: "This was the ground upon which [the latter] case was decided." The Court further held, that there was nothing in *Grosse* v. *Cooley* (1890), 43 Minn. 188, in conflict with the above views.

In *Timberman et al.* v. *Craddock*

(1879), 70 Mo. 638, the action was upon an express contract, whereby the defendant promised to pay the plaintiff a certain sum for effecting an exchange of a stock of goods, for real property. At the trial, the Court below, at the plaintiff's instance, instructed the jury that if the evidence showed the plaintiffs were the agents of, or employed or engaged by defendant in the manner alleged, and that they negotiated, or were the procuring cause of negotiations which resulted in an exchange, and that the defendants agreed to pay the amount to negotiate, or for having negotiated said trade or exchange, the plaintiffs were entitled to a verdict, even though the evidence showed that the negotiations resulting in the sale or exchange were between the defendant and the purchaser's agent, or with the purchaser. The Court below, at the defendant's request, also instructed the jury that they must believe that the plaintiffs negotiated the sale and exchange, and that the defendant agreed to pay the sum sued for, and unless such agreement was satisfactorily established, the plaintiffs could not recover. The judgment for the defendant was reversed, the appellate Court saying: "This instruction is not in harmony with the decision of this Court in *Tyler* v. *Parr* (1873), 52 Mo. 249, and is also in conflict with the instruction given for plaintiff, which properly declares the law."

In *Stinde* v. *Scharff* (1889), 36 Mo. App. 15, the plaintiff was authorized by the defendant to purchase land for him at a certain sum, and if the land could be purchased for a less sum, the plaintiff's compensation should be one-half of the difference between the two prices. Plaintiff entered into a contract for the purchase of the property, which was signed by himself as defendant's agent, and by other parties as the agents of the vendors. Justice BIGGS delivered the opinion of the Court, saying: "The right of real estate agents to demand and collect commissions has been a fruitful subject of litigation in this State during the past decade, and the general principles of law governing such cases may be considered as well settled. Before a real estate agent can recover his commissions for the *purchase* of real estate, he must show either a valid written contract with the owner of the title, or such a contract with the agent of the owner, having written authority from the latter to make the sale, or he must show that he produced, to the purchaser, the owner, and that the latter was then ready and willing to consummate the trade according to the terms agreed on." The plaintiff having failed in all these particulars, failed also to recover.

In *Bailey* v. *Chapman* (1867), 41 Mo. 536, the action was for commissions, and in giving judgment therefor the Court said: "A broker employed to make a sale under an agreement for a commission is entitled to pay when he makes the sale according to instructions and in good faith, and the principal cannot relieve himself from liability by a refusal to consummate the sale, or by a voluntary act of his own, disabling him from performance."

The same ruling prevails in *New Jersey: Hinds* v. *Henry* (1873), 36 N. J. Law, 328.

The legal attitude of a broker employed to buy or sell property, and his relative rights and duties

as the basis of his claim for compensation, were thus considered by Justice FINCH in *Sibbald* v. *The Bethlehem Iron Co.* (1881), 83 N. Y. 378: "The duty he undertakes, the obligation he assumes as a condition of his right to demand commissions, is to bring the buyer and seller to an agreement. In that all the authorities substantially concur, although expressing the idea with many differences of phrase and illustration. The description and definition of a broker involves this view of his duty. Story says: 'The true definition of a broker seems to be that he is an agent employed to make bargains and contracts between other persons in matters of trade, commerce or navigation for a compensation commonly called brokerage.' (Story on Agency, § 28.) In *Pott* v. *Turner* (1830), 6 Bing. 702, 706, a broker is more tersely and quite accurately described as 'one who makes a bargain for another and receives a commission for so doing.'" After citing numerous cases and the language of the Courts therein, the Justice sums up the matter in these words: "But in all the cases, under all the varying forms of expression, the fundamental and correct doctrine is, that the duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until that is done his right to commission does not accrue."

In *Wylie* v. *The Marine National Bank of the City of New York* (1875), 61 N. Y. 415, where action was brought by plaintiff to recover his commission upon an alleged sale of real estate for the defendant, the law is thus stated: "There are many reported cases of suits by real estate brokers for their commissions, and the opinions of the learned judges are not always in harmony with each other. But a few general rules may be regarded as settled. One who has employed a broker can himself sell the property to a purchaser whom he has procured without any aid from the broker. Before the broker can be said to have earned his commissions, he must produce a purchaser who is ready and willing to enter into contract upon his employer's terms. The broker must be the efficient agent or the procuring cause of the sale. The means employed by him, and his efforts, must result in the sale. He must find the purchaser, and the sale must proceed from his efforts acting as broker. It is not indispensable that the purchaser should be introduced to the owner by the broker, nor that the broker should be personally acquainted with the purchaser. But in such cases it must affirmatively appear that the purchaser was induced to apply to the owner through the means employed by the broker. If he was the producing cause of the sale, his right to compensation will not be affected by the circumstance that the owner was ignorant of it at the time he entered into the contract with the purchaser."

In *Fraser, Executrix, &c.* v. *Wyckoff* (1875), 63 N Y. 445, where the action was to recover commission for effecting a sale of a patent interest owned by the defendant, Justice ALLEN, in affirming the judgment of the Court below in the defendant's favor, thus states the law: "A broker for the sale of real estate is entitled to his commissions when, in the language

of the cases, he 'is the procuring cause of the sale'; that is, when he has found a purchaser and brought him to his employer and a contract is made between them for the sale of the property, or a purchaser is ready to purchase and the seller refuses or is unable to consummate the sale. He is not, however, entitled to commissions until he has performed the undertaking assumed by him. Whatever may be the terms and conditions upon which his right to compensation depends, they must be performed, as a condition precedent to a right of action for a commission. A broker to negotiate the sale of an estate is not entitled to his commission until he finds a purchaser ready and willing to complete a purchase on the terms prescribed by the seller and assented to by the broker."

In *Sussdorf* v. *Schmidt et al.* (1873), 55 N. Y. 319, the plaintiff claimed to recover commission for the sale of the defendant's real estate. The Court below gave judgment in his favor, which was affirmed on appeal, Chief Justice CHURCH thus stating the law: "A person claiming a commission upon a sale of real estate must show an employment, and that the sale was made by means of his efforts or agency. An owner may employ several brokers for the sale of the same property, and is of course only liable for commission to the one who effects the sale. And although he employs one or more brokers, he may negotiate and sell the property himself without liability to anyone for commissions. The undertaking of the broker is to make efforts to procure a purchaser, but if he fails, he is entitled to no pay, unless there is a special contract. But if the purchaser is found by his efforts and through his instrumentality, he is entitled to compensation, although the owner negotiates the sale himself. Nor is it indispensable that the purchaser should be introduced to the owner by the broker, nor that the broker should be personally acquainted with the purchaser; but in such cases it must affirmatively appear that the purchaser was induced to apply to the owner through the means employed by the broker." So in *Mooney* v. *Elder* (1874), 56 N. Y. 238, also an action to recover commission for procuring a purchaser for the defendant's property, in affirming the judgment in the plaintiff's favor Justice GROVER says: "To entitle the plaintiff to his commission under the contract, it must appear either that the property had been actually sold, either through the agency of the plaintiff or of some other, or that from like agency a purchaser had been found ready and willing to take the property upon the terms fixed by the defendant."

In *Graves et al.* v. *Baines et al.*, decided in the Supreme Court of Texas, June 24, 1890, the plaintiff was engaged by the defendant to sell upon commission; the plaintiff went with the purchaser to view the property, and the latter agreed to the terms, provided he could get the defendant to allow him an account as part payment. The purchaser subsequently went to see the defendant, arranged the matter with him, and purchased the property. In affirming the plaintiff's judgment, Justice COLLARD, after citing numerous authorities, said: "Baines [the plaintiff] procured the purchaser,

began the negotiations, which were afterwards finally consummated by the owners and the purchaser. His services as agent brought about the sale, and such services were the efficient cause of it."

The law as thus stated is supported by Chief Justice DIXON in *Stewart* v. *Mather and another* (1873), 32 Wis. 344: "The authorities * * show that wherever the sale is effected through the efforts of the broker, or through information derived from him, so that he may be said to have been the procuring cause of it, his services are regarded as highly meritorious and beneficial, and the law leans to that construction which will best secure the payment of his commissions, rather than the contrary."

In *Maryland*, a somewhat different rule would appear to prevail, in that the agent must not only find a purchaser ready and willing to complete the purchase, but such person must ultimately become the purchaser. This was held in *Kimberley* v. *Henderson and Lupton* (1868), 29 Md. 512, where the action was brought to recover commissions for effecting a sale. The contract of sale contained a clause that if either party failed to comply therewith, he should forfeit a given sum to the other. This the purchaser did, and so no sale was effected. In reversing the plaintiff's judgment Justice ALVEY said: "To be entitled [to their commissions], they should have completed the sale—that is, they should have found a purchaser in a situation, ready and willing to complete the purchase according to the terms agreed on. The undertaking to procure a purchaser requires of the party so undertaking, not simply to name or introduce a person who may be willing to make any sort of contract in reference to the property, but to produce a party capable, and who ultimately becomes the purchaser. * * Here the undertaking failed. A party was produced, it is true, and a contract entered into through the agency of the appellees, but of such a character that the party contracting, by the exercise of an option given him, relieved himself of the obligation to complete the purchase, and did not, in fact, become the purchaser." In *Richards, Ex'r, &c.* v. *Jackson* (1869), 31 Md. 250, the same ruling is established, the Court affirming and approving of the law as laid down in *Kimberley* v. *Henderson and Lupton, supra.* To the same effect is the more recent case of *Attrill* v. *Patterson* (1882), 58 Md. 226.

In *Livezy* v. *Miller* (1884), 61 Md. 336, Justice IRVING uses the following language confirming the above: "It is well settled by the authorities generally, and in this State, that a broker is entitled to his commissions if the sale effected can be referred to his instrumentality. It is also the established rule that, after negotiations, begun through a broker's intervention, have virtually culminated in a sale, the agent cannot be discharged, so as to deprive him of his commissions. If the agent is the *procuring cause* of the sale made, he will be awarded his commissions." In the more recent case of *Blake* v. *Stump et al.*, decided in the Court of Appeals of Maryland, November 14, 1890, Justice IRVING remarked that the "introduction must have been the procuring cause of the sale. It is the undoubted law that the introduction must be the foundation of the nego-

tiations and procuring cause of the sale. If it is such foundation and procuring cause, then the broker is entitled to commissions, notwithstanding the sale may have been finally effected by direct treaty of the parties without the broker's intervention."

The still more recent case of *Stevens* v. *Scott et al.* (1890), 43 Kan. 285, further supports the rule that when a broker finds a person able, ready and willing to purchase the property upon the terms specified by the owner, and the latter sells to such party, the broker is entitled to his commissions.

So strictly has the principle that the agent's acts must be the *causa causans* been applied, that he cannot recover if his acts are merely one of a chain, or a mere link in the chain, which procures the purchaser. He must in every case prove himself to be the *causa causans*. Thus in *Ramsey* v. *West* (1888), 31 Mo. App. 676, where the plaintiff was employed by the defendant to procure a purchaser, and found one, with whom the defendant entered into a written contract, stipulating the amount and mode of payment, and containing a condition by which if the purchaser failed to make payment or tender of the first payment on the day named, the contract was to become void. The purchaser refused to complete, and counter suits were instituted, and finally the sale was carried out substantially as originally agreed on. On re-hearing, Justice HALL, in giving judgment in defendant's favor, said: "There was no evidence of anything done by the plaintiff to procure that sale but the procurement by him of that contract. * * The broker must be the procuring cause of the contract on which he depends for his recovery. It will not suffice for his act to be one of the chains of causes producing the contract; it must be the procuring or inducing cause, or as it has been said, it must be the *causa causans*."

It is often a question, notwithstanding the general rule as above laid down, in cases where the broker's agreement has merely been to procure a purchaser, as to what act of his will amount to the finding of a purchaser, or the effecting of a sale. In *Rice and another* v. *Mayo* (1871), 107 Mass. 550, where the plaintiffs contended the agreement was, that if the plaintiffs would endeavor to sell the defendant's land for a certain sum, the defendant would pay them a given commission whenever the land should be sold, whether sold through the aid of the plaintiffs or not, Justice GRAY ruled that: "A contract or memorandum in writing, binding both seller and purchaser, was a sale effected, within the meaning of the agreement on which the plaintiffs relied, although a formal deed had not been executed or delivered."

In *Flower* v. *Davidson et al.*, decided in the Supreme Court of Minnesota, July 11, 1890, the contract depended upon the following letter written by the defendants: "If a sale is made by you to a customer within the time limited in the option of even date herewith, and on terms mentioned therein, the estate of W. F. Davidson will allow and pay to you, on the completion of the transfer of said property, a commission of Five thousand dollars in cash; but if for any

reason a sale is not consummated, there shall be no commission paid, or any obligation whatever in the premises. If there should be any unexpected delay, and a sale should ultimately be consummated to a customer whom you have found, and who has come to us through your negotiations, and on terms contained in the option, you shall nevertheless be paid the Five thousand dollars." In finding for the defendants, Justice MITCHELL declared that: "According to the contract * * although plaintiff procured a purchaser who entered into a contract with defendants for the purchase of the property on the proposed terms, yet he would not be entitled to his commission until and unless such contract was 'completed' or 'consummated' by the transfer of the property, and the payment or securing of the purchase money in accordance with the terms upon which plaintiff was authorized to sell, or which defendants accepted as such."

In cases where there has been a binding contract of sale entered into between the vendor and the purchaser, and the latter has refused to complete, and the former has seen fit to release him from his obligation, the courts have in some instances held that such facts did not relieve the vendor from his liability to pay the broker his commission. Thus in *Love et al.* v. *Miller et al.* (1876), 53 Ind. 294, where the appellants, real estate brokers, and the appellees, owners of real estate, mutually agreed that if the appellants would "find a purchaser, or make a sale of the said real estate," they should receive for their commission one thousand dollars. An offer was procured and accepted by the appellees. The purchaser refused to complete the sale, and the appellants thereupon told the appellees they should hold them to their agreement for commission. The appellees refused to pay it, and the question then raised was: Are the appellants entitled to recover their commission against the appellees upon the facts stated? Justice BIDDLE, in giving judgment for the commission, said: "The case, we think, turns upon the sole question whether the offer and acceptance, as set forth, amounts to 'finding a purchaser or making a sale' of the real estate described, or not, within the meaning of the agreement made between the appellants and appellees. The question involved in this case has never before been presented in this State, we believe. Indeed, we have very few reported cases, in any way touching the subject matter of brokers' commissions. The authorities of other States do not seem to entirely agree; but upon close analysis, it does not appear that they are in serious conflict. To complete a sale of personal property, either actual or potential, delivery of the article sold is necessary, unless there is some different special stipulation in the agreement." After examining the authorities cited on behalf of the appellees in support of their contention, which was, "that no brokerage is due until the sale is complete and executed; that is to say, until the consideration of the sale has passed to the vendor," the same learned Judge proceeded: "This rule is not supported, indeed we think it is quite overthrown, by the current of authorities; nor does it seem to us to be applicable to the State of Indiana. In this State,

lands are bought and sold almost as freely as commodities; they are often mortgaged or pledged as a basis of business operations; sales are made upon deferred payments, for the purpose of holding them as investments; conveyances are frequently executed in trust, for the convenience of the parties; large quantities of land are held by executive contracts, to facilitate transfers by assignments, in many of which cases the consideration is not paid, and not to be paid, and the title conveyed in fee, for months, and even years, after the sale is made, possession given and full enjoyment had. Under such circumstances, to adopt a rule which would deny the broker his commission until the consideration was paid and the final conveyance executed, would be manifestly unsuitable to our condition, and we think unjust. We are of opinion that when the broker has effected a bargain and sale, by a contract which is mutually obligatory on the vendor and vendee, he is entitled to his commission, whether his employer chooses to comply with or enforce the contract or not." In conclusion, referring to the case of *Lane* v. *Albright*, *supra*, he said: "We can see no distinction between the cases in principle, as to the rights of the agent or the brokers."

In the *Kentucky* case of *Coleman's Ex'r* v. *Meade*, *&c.* (1877), 13 Bush. (Ky.) 358, Coleman employed the defendants to procure a purchaser for his property for a certain commission. They negotiated with a party, but, being unable to arrange, a personal interview of all parties was had, again without result. Coleman then gave defendants a written proposition of the terms of sale; they procured the same person to accept it in writing, and returned it to Coleman. The purchaser found some defects in the title, which were cured; afterwards he found the property a trifle less in quantity, and refused to complete his contract, and Coleman declined to take action to compel specific performance. Suit was then brought by the appellees for commission, and judgment rendered in their favor. In affirming it, the Court said: "Meriwether [the purchaser] was bound by the executory contract, and Coleman might have enforced it if he had desired to do so. All the brokers had to do was to furnish an eligible purchaser, that is, a person ready and willing to enter into a contract to buy the property. It was then for the principal to decide whether the person presented was acceptable. If he accepted him, he became a purchaser within the meaning of the contract, and the duties of the brokers were at an end, and their commission was earned as soon as an enforceable contract was executed." After commenting upon, and distinguishing the case from *McGavock* v. *Woodlief* (1858), 20 How. (61 U. S.) 221, the Court stated the law as follows: "The true doctrine we take to be this: The broker undertakes to furnish a purchaser, and is bound to act in good faith in presenting a person as such, and when one is presented, the employer is not bound to accept him or to pay the commission, unless he is ready and able to perform the contract on his part according to the terms proposed; but if the principal accepts him, either upon the terms previously proposed or upon modified terms, then agreed

upon, and a valid contract is entered into between the principal and the person presented by the broker, the commission is earned. But if, as was the case in *McGavock* v. *Woodlief*, the principal rejects the purchaser and the broker claims his commission, he must show not only that the person furnished was willing to accept the offer precisely as made, but, in addition, that he was an eligible purchaser, and such as the principal was bound, as between himself and the broker, to accept."

Leete v. *Norton* (1875), 43 Conn. 219, was a case wherein the defendant had placed in the hands of the plaintiff a piece of real estate for sale or exchange. Shortly afterwards a third person placed other property in the plaintiff's hands for a like purpose. Plaintiff negotiated between them for an exchange, the agreement, which contained a clause to the effect that if either of the parties refused to perform the contract, he should pay the other party a certain sum, being reduced into writing and duly executed. The third person failed to perform his part of the contract, and for this reason, and without the defendant's fault, the exchange fell through. The plaintiff claimed his commission, for which the Court gave him judgment, saying *per* Justice FOSTER: "Had this contract been consummated * * it cannot be doubted that the plaintiff would have been entitled to the commissions now demanded. And for the conclusive reason that he would have done just that, and all that, which the defendant employed him to do; just that and all that he undertook to do. The defendant would have obtained a property more valuable, in his estimation, than the one with which he had parted; so much more valuable that he preferred paying the plaintiff the compensation demanded for negotiating the contract which enabled him to obtain it. * * Now though the plaintiff has not effected a sale or an exchange of the defendant's property, yet he has negotiated a contract for such exchange, agreed to by the defendant, in which contract a sum of money is specified which the defendant agrees to accept; and in consideration of which to relieve [the third party] from his obligation to make the exchange of properties. Having thus fixed on the sum * * as an equivalent for the performance of this contract to exchange his property, as between himself and his co-contractor, the defendant cannot be allowed to deny that that sum of money is an equivalent, as between himself and the plaintiff, by whose aid he made the contract. * * The plaintiff then, having rendered services for the defendant, which he agrees are an equivalent to procuring an exchange of his property, is fairly entitled to the same compensation as he would have been entitled to had the exchange been effected."

In the case of *Love et al.* v. *Owens et al.* (1888), 31 Mo. App. 501, the appellants, the defendants below, contended that notwithstanding the agent may procure a purchaser, ready and willing to enter into a contract to take the property on the terms proposed, or such as is agreeable to the seller, and the agent bring the seller and purchaser together, who then enter into a written contract, executed by them, as in this case, yet if the purchaser afterwards fail to per-

form the contract without any fault on the part of the seller, then the agent is not entitled to his commission, although the purchaser be perfectly solvent and able to perform. The Court, after reviewing the previous cases, affirmed the plaintiffs' judgment, saying: "The prevalent rule is, that where the broker, pursuant to his employment, produces a purchaser who is willing and ready to take the property on the terms acceptable to the seller, and the seller enters into a written contract with him expressing the terms of the sale, and the seller is solvent and able to perform, the broker then becomes entitled to his commission, although the vendee afterwards refuses to perform, without any fault on the part of the vendor. * * And the language of our Courts has been that whenever the agent procures a purchaser ready, willing and able, and he is accepted by the vendor, the agent is entitled to his reward. * * To permit the seller to escape his liability to the agent, merely because he is willing to let the purchaser go rather than bring a suit on the valid contract, would be to encourage injustice and open up the way for the purchaser and vendor to get off, merely by the one failing to comply voluntarily with his written compact, and the other to enforce it, the one forfeiting merely his first payment, and the other pocketing it, leaving the agent without redress for the wrong done him."

In *Willes* v. *Smith*, decided in the Supreme Court of Wisconsin, May 20, 1890, the plaintiff had procured a purchaser under a valid contract, to which the vendor, had he so chosen, could have held the purchaser; but he saw fit to release the purchaser, who was unwilling to complete the contract. It also appeared that the vendor retained a sum that had been agreed upon as liquidated damages for a breach on the vendee's part. The Court below gave judgment for the defendant, on the ground that the purchase was never completed, and Chief Justice COLE, in reversing such judgment, remarked: "The defendant saw fit to waive performance, and retain the property and the two hundred dollars which had been agreed upon as the amount of liquidated damages for a breach on the part of the vendees. It appears, therefore, that the plaintiff procured persons willing and able to purchase the property on the terms fixed by the defendant, and consequently earned his commissions; for the rule of law is well settled in this State that a broker employed to make a sale of property at a price stated or fixed by the owner, is entitled to his commissions when he produces a party who makes the purchase. And it is, in general, enough, in such a case, that the broker produce a party ready to make the purchase at a satisfactory price; and the principal cannot relieve himself from liability by capricious refusal to consummate the sale, or by a voluntary act of his own, disabling him from performance. * * It is no answer to say the purchaser refused to carry out the contract."

In *Lawrence et al.* v. *Atwood* (1878), 1 Ill. App. 217, the action was to recover commissions due from the defendant for services rendered by the plaintiffs as brokers, in finding a purchaser for the defendant's farm. The defendant gave the plaintiffs the price and terms of sale, and a promise to

pay a commission if a purchaser was found by them. The plaintiffs tried to effect a sale, and in the course of such efforts brought the matter before another firm of brokers, one of whom called on the defendant with a view to purchase, but nothing was done, owing to a misunderstanding. Shortly afterwards a sale was arranged by the other brokers upon modified terms of payment. The purchaser failed to carry out the terms of the deed of conveyance, and re-conveyed to the defendant. The plaintiffs claimed two-thirds of the commission. In delivering judgment for the plaintiffs, Justice PLEASANTS said: "There is no dispute about the facts; the only question being whether they constitute performance by the plaintiffs of their contract to find a purchaser. As a means to that end they employed another broker, and he procured and introduced as such a party who was so accepted by the defendant and consummated the purchase, but upon terms differing in some particulars from those first offered. * * The change was not substantial. It was not effected by any agency or neglect of the plaintiffs, but by negotiations to which the defendant was an immediate and principal party, and was by him freely consented to. Such a change so effected should not, in our opinion, be held to defeat the claim of the broker for his commission. Nor should the failure of the purchaser to pay * * and the consequent cancellation of the purchase, by agreement of the parties to it, have that effect. He was none the less a purchaser within the meaning of the contract with the plaintiffs. His purchase was in no degree contingent or provisional. An absolute deed was executed to him, which conveyed the entire title, and for so much of the consideration originally required as he did not pay in money he made and executed and delivered to the defendant enforceable contracts and securities of the character originally contemplated and to his acceptance and satisfaction at the time. * * They [the plaintiffs] were not guarantors of his [the purchaser's] ability to make any deferred payment, nor could their right to commissions be affected by the want of it, since he was accepted by the defendant, complied with all the terms required to consummate the purchase, and did entirely consummate it. This question of ability, as affecting the broker's right in a case free from fraud, can only arise when the proposed purchaser is rejected, notwithstanding his offer and readiness to comply with such terms and thus to consummate the purchase. * * He [the defendant] consented at the instance of the purchaser to some modification of the terms he had submitted * * and fully completed the sale accordingly. Thereupon the broker became entitled to his commissions, unless his right was postponed by special agreement. * * It is clear that commissions were to be due when a purchaser should be found, which would certainly be when the purchase should be made."

In *McGavock* v. *Woodlief* (1858), 20 How. (61 U. S.) 69, referred to and distinguished by the Court in *Coleman's Ex'r* v. *Meade, &c.*, *supra*, page 131, the terms of the sale as given to the broker, were simple and specific, and were agreed to by the purchaser, but he subsequently sought a substantial

change. The vendor refused to entertain the proposal. The Supreme Court of the United States therefore found against the broker, and declared the rule to be that: "Certainty in the offer to fulfill is as important to the vendor as in the terms of the sale to the vendee, and equally necessary before the vendor can be put in fault. The broker must complete the sale; that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on, before he is entitled to his commissions. Then he will be entitled to them; though the vendor refuse to go on and perfect the sale."

The question has often been raised, whether the mere introduction of the parties to each other by the broker, leaving the terms of the sale to be determined between them, is a sufficient act on his part. The point has also been unsuccessfully taken that where the purchaser was introduced by the broker in the first instance, but the negotiations fell through, and the vendor subsequently sold to the same party, that the broker is not entitled to his commission. Thus in *Scott* v. *Patterson et al.*, decided in the Supreme Court of Arkansas, March 15, 1890, the defendant was introduced by the plaintiffs to the prospective purchaser, and negotiations were pending for some little time without any agreement. The parties afterwards met at the plaintiff's office, but the negotiations again failed, and the defendant then told the purchaser that the matter was off. Subsequently, after an attempted sale by defendant himself, he sold the property to the first purchaser and went with her to the plaintiffs' office for the preparation of the deed. The defendant refused to pay a commission. In delivering the opinion of the Court awarding the plaintiffs their commission, Justice HUGHES cited the language of the Court in *Tyler* v. *Parr* (1873), 52 Mo. 249: "The law is well established that, in a suit by a real-estate agent for the amount of his commission, it is immaterial that the owner sold the property, and concluded the bargain. If, after the property is placed in the agent's hands, the sale is brought about or procured by his advertisements or exertions, he will be entitled to his commissions; or if the agent introduces the purchaser, or discloses his name, to the seller, and, through such introduction or disclosure, negotiations are begun, and the sale of the property is effected, the agent is entitled to his commissions, though the sale may be made by the owner."

In *Waterman* v. *Boltinghouse* (1890), 82 Cal. 659, the action was brought to recover commissions for an alleged sale of land. In holding that the plaintiff could not recover, Justice THORNTON said: "He never produced a purchaser ready and willing to buy on the terms of his employer, the defendant. He cannot therefore recover. Here the plaintiff had the exclusive right to sell for a term * * and the defendant, during this period, himself effected a sale. Though the plaintiff had the right to sell, to the exclusion of his employer, still he cannot recover his commissions unless he has produced a purchaser ready and willing to buy as above stated."

In *Gillen* v. *Wise et al.* (1888), 14 Daly (N. Y.) 480, the suit was brought by the plaintiff as assignee

of one Anthony to recover commission for procuring an exchange of property, and in affirming the plaintiff's judgment the Court said: "There is no question of law in this case that has not been repeatedly passed upon. Anthony is employed by defendants to procure city property in exchange for theirs; he refers them to certain houses and lots, and they promise him that if they exchange for them, they will pay him $500 agreed upon for his compensation; he tells them the name of the owner and of the agent of the houses, and they conduct their negotiations for the exchange through the latter, ignoring Anthony. These are the facts established by the verdict, and there can be no disturbance of that verdict in plaintiff's favor upon these facts." The case of *Jones* v. *Berry* (1889), 37 Mo. App. 125, further shows that, "It is well settled in this State, that if property is placed in the hands of a real estate agent for sale, and a sale is brought about through the exertions of the agent, the latter is entitled to his commissions, even though the negotiations are conducted and the sale concluded by the owner of the land and the purchaser." In this case the sale was negotiated and concluded by the defendants, who claimed that they had rescinded their relationship with the plaintiff; but inasmuch as they had not given notice of their intention, they were not allowed to avoid payment of the commission. To the same effect, *Millan & Abbott* v. *Porter* (1888), 31 Mo. App. 563.

In *McConaughy* v. *Mahannah* (1888), 28 Ill. App. 169, there was an agreement between the parties that the plaintiff should advertise a farm for sale in two papers, the plaintiff paying one advertisement and the defendant the other. The plaintiff was to have a certain commission on the sale, and was authorized to sell at a certain price per acre. After the property was advertised by the plaintiff as arranged, a party called upon him and offered a less price per acre. Of this offer the plaintiff informed the defendant, who immediately went to the plaintiff's office and held a personal interview with the intending purchaser. Nothing however was arranged at this interview, but a few days later the same party called on the defendant and completed the purchase at a higher figure, though less than the amount at which plaintiff was originally instructed to sell. In giving judgment for the plaintiff's commission, Justice UPTON stated the law as follows: "The general rule of law applicable to this class of cases as we understand it, briefly is: That if the land, while in the hands of the broker or agent for sale, is sold by the principal, still if the purchaser is procured or obtained by the efforts of the agent or broker, such agent is entitled to his commission. The commissions of a broker for the sale of real estate are due when he has found a purchaser who buys the property, and his right to such commissions is not affected by any modification of the terms of payment or modes of security, or ultimate compliance with the conditions of such sale made between the buyer and seller, different from the terms first given by the seller to the broker."

In *Singleton* v. *O'Blenis et al.*, decided in the Supreme Court of Indiana, September 23, 1890, the

plaintiff was the defendant's agent to sell land, for a period of six months, unless a sale took place earlier, and the defendant reserved a right to sell himself, paying the plaintiff the same fee as though he had effected the sale. The defendant effected a sale himself within seventeen days, and refused to pay the plaintiff his fee. Chief Justice BERKSHIRE, in affirming the plaintiff's judgment, said: "The appellant reserved the right unto himself of making a sale, but in case a sale should be made by him, O'Blenis was to be paid his fee the same as if he had found the purchaser. * * The contract rested upon a sufficient consideration, and the appellant having made the sale in such a short time after its execution, we think it disclosed sufficiently such a performance of the conditions upon which the compensation of the agent depended as to entitle him thereto. What our conclusion might be, had the sale which the appellant made, not taken place until near the end of the time given to O'Blenis in which to make a sale, is a question that we are not called upon to deeide."

The case of *Lockwood* v. *Rose et al.*, also decided in the Supreme Court of Indiana, November 12, 1890, although turning upon the construction of the broker's contract, supports the above principles.

In *Plant et ux.* v. *Thompson et al.*, decided in the Supreme Court of Kansas, December 7, 1890, property was placed in the plaintiffs' hands for sale, who offered it to a party, but nothing definite was then done. Subsequently the defendant's wife called upon plaintiffs and stated that they would like to sell, and would have to place the property in other brokers' hands as well, and that the defendants would also try to sell it themselves. The plaintiffs made no objection, except that if the property should be purchased by the party to whom they had offered it, they should claim their commission. The defendants afterwards sold to this party, and the plaintiffs claimed their commission. In affirming the plaintiffs' judgment, HOLT, C., followed the ruling in *Lloyd* v. *Matthews* (1872), 51 N. Y. 124; *Carter* v. *Webster* (1875), 79 Ill. 435; *Sussdorf* v. *Schmidt* (1873), 55 N. Y. 319, and remarked. "The claim of the plaintiffs for commission is not affected because the defendants saw fit to sell the same land for a price less than they gave it to plaintiffs to sell. * * The defendants will not be allowed to take advantage of their introduction to the purchaser by the plaintiffs, and reap the benefits of the sale made to him in consequence, and then escape all liability of paying them their commission because they sold the land for a sum less than the price given their agents, where the reduction was made of their own accord."

In *Goward and another* v. *Waters* (1868), 98 Mass. 598, the action was brought upon a writing by the defendant, whereby he agreed, in consideration of the plaintiffs purchasing or procuring a purchaser for certain land of the defendant's at a given price, to pay the plaintiffs all moneys exceeding the sum named, and also that if defendant should himself sell the premises, to pay the plaintiffs three per cent. of the price paid him. The plaintiffs tried to procure a purchaser, but before they succeeded, the defendant sold the premises. The Court below having held that the

plaintiffs could only recover on a *quantum meruit*, on appeal Justice WELLS said: "At the time the contract was signed it was mere *nudum pactum*. The plaintiffs paid nothing, incurred no expense or loss, and entered into no obligation on their part. They were at liberty to act or not as they pleased; and would incur no liability by failing to do anything. But it is also apparent that the writing contemplated services to be rendered and expenses to be incurred by the plaintiffs for the defendant; and that the promises were made in view of such future services and expenses. The writing is merely a stipulation, by the defendant, of the terms upon which compensation shall be made by him. Subsequent performance of services and expenditure of money, in prosecution of the employment thus authorized, furnish a sufficient consideration for the promises of the defendant. The case finds such a consideration in fact. After the plaintiffs had entered upon this employment, the defendant could not sell without making the stipulated compensation. If they failed to purchase or find a purchaser within a reasonable time after being called upon to fulfil, he might terminate the agreement. But this has not been done. The plaintiffs are therefore entitled to the price agreed for upon the event of a sale by the defendant himself."

In *Arrington and Farrar* v. *Cary* (1875), 5 Baxter (Tenn.) 609, the plaintiffs were employed by the defendant to sell a house for a given sum. The plaintiffs advertised, and showed the property to a caller, but nothing definite was settled. These facts were communicated to the defendant, who saw the party himself and concluded the sale. The plaintiffs sued for their commission, and in affirming judgment in their favor, Justice MCFARLAND stated that: "When a broker is employed to sell real estate, and produces a person who ultimately becomes a purchaser, he is entitled to his commissions, although the trade may be effected by the owner. When the owner employs the agent to sell, or to assist him in the sale, if he be unwilling to pay the usual and customary commissions, he should make a special contract with him, otherwise the agent will be entitled to such reasonable commissions as, for similar services, real estate agents in that particular locality are by usage and custom entitled."

In *Monroe* v. *Snow et al.* (1890), 131 Ill. 126, the contract was signed on the defendant's behalf, by the plaintiffs, as "His authorized agents," and the defendant objected that the plaintiffs had no written authority to make the sale. It appeared, however, that the defendant had given the plaintiffs verbal authority to sell, for a certain price, and if they could do no better, to accept a less sum, which was named, and afterwards reduced to the amount for which a sale was effected, but repudiated by the defendant. The Court below instructed the jury that, if they believed the defendant requested or authorized the plaintiffs to sell, or find a purchaser for the property at the price; and that the authority was not limited nor revoked, and that a purchaser was found, willing and able to buy; and that the defendant, on being notified thereof, refused to carry out the purchase, the plaintiffs had earned their com-

mission. On appeal from the judgment for the plaintiffs, it was objected, that the instruction authorized the plaintiffs to recover without showing that an enforceable sale had been made, or that the contract was completed by a conveyance. Chief Justice SHOPE, however, affirmed the judgment, saying: "Appellant contends that, inasmuch as he refused to ratify the contract of sale, and the purchaser could not have it specifically performed, for want of written authority to the plaintiffs to make the sale, he is not bound to pay the plaintiffs anything for their services. We cannot lend our sanction to this view of the law. A real-estate broker employed to make sale of land, who finds a purchaser at the price fixed by the owner, who is ready, able and willing to take a conveyance and pay the purchase price, has earned the compensation agreed to be paid him, or, if the compensation is not fixed by the parties, he will be entitled to recover the usual and customary reasonable compensation for the service performed." And after citing *McGavock* v. *Woodlief* (1858), 20 How. (61 U. S.) 221; *Doty* v. *Miller* (1865), 43 Barb. (N. Y.) 529, and *Bailey* v. *Chapman* (1867), 41 Mo. 537, he remarks: "We are entirely content with the view expressed in the foregoing citation of authority, and are of opinion that there was no error in giving said instruction."

So it has been held that the vendor cannot, by any act of his own, avoid the payment of the broker's commissions, where the latter has by his own efforts procured a purchaser. That the title is defective cannot affect the broker's right, so long as he is not aware of the fact at the time he procures the purchaser. Even if the sale is never consummated, he will still be entitled to his commissions, provided there is no fraud on the broker's part.

This question of broker's commissions was raised in the Supreme Court of the United States, in *Kock* v. *Emmerling* (1860), 22 How. (63 U. S.) 69, on appeal from a judgment in the Circuit Court for the Eastern District of Louisiana, upon the following facts: Emmerling was employed by Kock to sell a certain plantation, and by written instructions was authorized to accept a given sum, payable so much in cash, and the balance in instalments bearing interest. Emmerling found a purchaser at the price, who wanted different terms. Kock consented to the alteration required, and met the purchaser to complete the sale. Then, for the first time, Kock insisted upon different terms, but the purchaser offered to carry out the contract as made originally. Kock refused to comply, capriciously, assigning no valid reasons, and finally refused to sell. In affirming the judgment, Justice MCLEAN said: "The terms of the contract as to the sale were specific and unmistakable, and everything was done that could be done by the purchaser to carry out the contract; but the vendor, without any reason, refused to complete it. * * It is not perceived why a contract to sell property, real or personal, on commission, should not be governed by the same rules as other sales. If a usage has been established * * for the sale of plantations, such usage being reasonable, should govern in the absence of a special agreement. Nothing is more common in our large cities

than to charge brokerage for procuring the loan of money. This varies as the money market rises or falls. One per cent., and sometimes two, is charged for this service. The same rule applies to a sale of property. Where the contract is fair, it is not perceived why such compensation should not be paid, as agreed by the parties, or by an established usage. Where the vendor is satisfied by the terms, as made by himself, through the broker, to the purchaser, and no solid objection can be stated, in any form, to the contract, it would seem to be clear that the commission of the agent was due, and ought to be paid. It would be a novel principle, if the vendor might capriciously defeat his own contract with his agent by refusing to pay him when he had done all that he was bound to do. The agent might well undertake to procure a purchaser; but this being done, his labor and expense could not avail him, as he could not coerce a willingness to pay the commission which the vendor had agreed to pay. Such a state of things could only arise from an express understanding that the vendor was to pay nothing, unless he should choose to make the sale."

In *Birmingham Land and Loan Co.* v. *Thompson* (1888), 86 Ala. 146, Chief Justice STONE, after citing *Coleman's Ex'r* v. *Meade* (1877), 13 Bush. (Ky.) 358, remarked: "The fact that the sale of the property is never consummated, does not weaken the force or application of the rule, provided the sale is not prevented by some fault or misrepresentation on the part of the broker, or on account of the inability of the proposed purchaser to comply with the terms of the sale. The broker has earned his commission, when he has found a purchaser able and willing to purchase at the stipulated price and terms, and who has been accepted by the owner of the property, although the sale is never completed, if the failure to complete the proposed sale, is the consequence of an incumbrance upon the property, a defect in the title, or of some fault of the owner of the property to comply with the terms of the sale. Without some special stipulation to that effect, the broker does not warrant the title to the property; and if there is a defect therein, on account of which the sale is never completed, the broker is without fault, and should not be made to suffer thereby. He has fully performed his part of the transaction, when he has procured a purchaser, able and willing to buy. His office has ceased, and his commission is earned." To the same effect, *Sayre* v. *Wilson and Ingram* (1888), 86 Ala. 151; *Henderson* v. *Vincent* (1887), 84 Ala. 99.

In *Phelps et al.* v. *Prusch* (1890), 83 Cal. 626, where the authority was to sell the property at a certain price, upon certain commissions, the defendant undertaking to furnish a complete and perfect abstract of title, a purchaser was procured willing to take the property, "Title to prove good or no sale, and deposit to be returned." These terms were agreed to by the defendant, who delivered the abstract of title, but subsequently became dissatisfied and gave notice of certain objections in his own title, consequently the purchasers refused to complete. In affirming the plaintiff's judgment, the Court said: "The contract of the parties was

not that there should be an actual transfer of the title, or a valid contract for such transfer. It was merely that the broker should find a purchaser who was willing to buy upon certain terms. This being the contract on the broker's part, it was performed when he produced purchasers who were willing to buy upon such terms. It makes no difference whether the defendant had a good title or not. If he had not a good title, and the transaction failed in consequence, that was not the broker's fault, and is no reason why he should lose his commission. If he had a good title, but took measures to have it rejected by the purchasers' attorney for the purpose of defeating the sale, it needs no argument or authority to show that the broker's right to a commission is not thereby defeated." To the same effect, *Blaydes et al.* v. *Adams* (1889), 35 Mo. App. 526; *Hannan* v. *Moran* (1888), 71 Mich. 261.

Another recent case, decided in the Supreme Court of Colorado, November 7, 1890, is *Cawker* v. *Apple et al.*, where the plaintiffs sought to recover for procuring a purchaser for the defendant's land. The sale was not consummated, as the defendant had sold more land than he was entitled to. The purchaser was willing to take the land really owned by the defendant, and pay for it at the same price per acre, but the defendant refused to complete the sale unless he would pay the price mentioned in the contract. Justice HAYT, in affirming the plaintiffs' judgment, said: "The consummation of the sale was prevented, however, by appellant's [defendant's] refusing to deed the tract, unless he received pay also for the land owned by the railroad company. Appellant knew at the time he placed the land with appellees [plaintiffs] for sale that the railroad company owned and occupied a portion thereof. He could not give the purchaser a title to the lands so occupied, and was not entitled to pay therefor. Under the circumstances, we are satisfied that his demand is entirely without foundation, and doubtless made for the purpose of defeating the sale. Upon the facts, we think appellees were entitled to the commissions. In the case of *Finerty et al.* v. *Fritz* (1879), 5 Colo. 174, it is said. 'But where an agent has produced a purchaser who is acceptable to the owner, and able and willing to purchase on terms satisfactory to the owner, he has performed his duty, and if, from any failure of the owner, to enter into a binding contract, or to enforce a contract against the purchaser, the sale is not completed, the agent may recover his commissions.' "

In *Lane* v. *Albright* (1874), 49 Ind. 275, the action was to recover a commission upon a contract to pay the plaintiff a certain sum for furnishing a purchaser for the defendant's real estate at a given price; the plaintiff to let the defendant know thereof soon. The plaintiff alleged that he sold the land within twenty days. The Court below instructed the jury to find for the plaintiff, unless the evidence showed that the defendant had sold the land before the plaintiff did, except it was shown that there was a contract between the parties that the defendant was not to sell the land, or if he did, that he was to pay the agreed commission. The jury found for the defendant. It appeared that the defendant had prevented the sale

of the land upon the plaintiff's contract, by selling to another person at a reduced sum. In reversing the judgment, the Court said: "The appellee [defendant] disabled himself from carrying out the contract of sale made by appellant. The fact that the appellee [defendant] had authorized the appellant [plaintiff] to sell his land, did not deprive himself of the power of selling it, but he could not thereby avoid his liability to appellant. * * When the performance by one party is prevented by the act of the other, the party not in fault should recover in damages such sum as will fully compensate him for the injury which he has sustained by reason of the nonperformance of the contract. This principle is directly in point here. The appellant * * acted in good faith, while * * the appellee sold * * at a reduced price to avoid the payment to the appellant of the sum agreed upon. The appellee cannot thus avoid the obligation of his contract. He made his proposition broad and comprehensive, and imposed no conditions. He might have provided that if he had effected a sale of the land before the appellant found a purchaser, he was not to pay him the sum agreed upon. Having failed to do so or impose any other conditions, the courts cannot make a new contract for him or impose conditions not imposed by himself, but must determine the rights of the parties under the contract as made by them."

So in *Flower* v. *Davidson et al.*, decided in the Supreme Court of Minnesota, July 11, 1890, Justice MITCHELL said: "Defendants could not deprive plaintiff of his commission by a mere willful, arbitrary, capricious, or fraudulent refusal to enter into a contract with a proposed purchaser, or to consummate or perform such a contract when made: that is, anything amounting to fraud or bad faith on the part of the vendor towards the agent." He further stated that the words "for any reason" included "any cause for the failure of the contract of sale to be consummated or carried out not attributable to the fraud or arbitrary and capricious act of the defendants, such as the failure or refusal of the purchaser to carry out the contract of sale, or the inability of the defendants to make good title to the property or some part of it, or the refusal of the purchaser to accept the title because for some reason it proved to be unmarketable. We apprehend it is to guard against such contingencies as these that owners who place their property in the hands of agents or brokers for sale would make the payment of commissions conditional on a sale being actually carried out by a transfer of the property and payment of the purchase money. To entitle the plaintiff to recover his commission, it was therefore incumbent on him to prove that a sale to a purchaser of his procuring was complete or consummated by a transfer of the property, or that this was defeated or prevented by the fraudulent or merely arbitrary and capricious conduct of the defendants."

In *Gauthier et al.* v. *West*, decided also in the Supreme Court of Minnesota, January 5, 1891, where the contract was that no commission should be paid until the sale was consummated by the delivery of the deed, the Court held that in such a case to be an implied warranty of the owner's ability to con-

fer a perfect title, and if such title was defective, and the fact not known to the broker, he could recover commissions if he procured a purchaser able, ready and willing to complete the contract, and accept a deed at the time fixed for completion of the purchase.

In the recent case of *Greenwood* v. *Burton*, decided in the Supreme Court of Nebraska, November 6, 1889, the same principle is followed. Burton had been employed by Greenwood to effect a sale or exchange of land. He found a purchaser ready, able and willing to complete the contract, but the vendor, Greenwood, refused to perform his part, and also to pay the agreed commission to Burton. Justice MAXWELL, in affirming the plaintiff's judgment for the commission, said: "It is evident * * that Burton has performed all the labor required of him in securing an exchange of the land in question, and that Greenwood, after having entered into the contract, refused, without sufficient cause, to perform the same."

The same rule is laid down in *Hinds* v. *Henry* (1873), 36 N. J. Law, 328, by Justice DEPUE, in these words: "The general rule is that the right of the broker to commissions is complete, when he has procured a purchaser able and willing to conclude a bargain on the terms on which the broker was authorized to sell. When such a purchaser is produced, the principal cannot defeat the agent's right to compensation by a refusal, without sufficient reason to fulfill the agreement which the agent had power to make." He further says: "This rule rests upon the general usage of the business, and is liable to be modified or superceded by a special agreement in relation to the particular transaction, in connection with which the broker was employed, or by special agreement between the parties. Thus, in London, by the established usage, a ship broker negotiating the hiring of vessels, is not entitled to commissions until the chartering is complete, and cannot recover compensation unless the charter party is signed, even though the negotiation was rendered fruitless by the fault of the employer." And again: "The broker may also, by special agreement with his principal, so contract as to make his compensation dependent on a contingency which his efforts cannot control, even though it relate to the acts of his principal. A contract of that character is binding, and no action can be maintained until the contingency has arisen."

In *Doty* v. *Miller* (1865), 43 Barb. (N. Y.) 529, Justice SUTHERLAND said: "A broker or agent who undertakes to sell property for another for a certain commission, if he finds a purchaser willing to purchase at the price, has earned and can recover his commission, though the sale never was completed, if the failure to complete the sale was in consequence of a defect of title, and without any fault of the broker or agent." Again, in *Fraser, Executrix, &c.* v. *Wyckoff*, *supra*, page 126, Justice ALLEN said: "If the principal prevents a performance by the broker, the right of the latter to recover would depend upon a different principle, and he might recover without proving a strict performance." It did not appear, however, in the above case, that any sale was effected, as the defendant made a different arrangement for

utilizing his patent, by entering into partnership with others, and although the plaintiff was instrumental in effecting such co-partnership, yet as his contract was for an absolute sale, for a certain sum to be paid the defendant, he could not recover his commission.

The same is the rule in *Pennsylvania*, where a sale is not consummated owing to a defective title. Thus in *Sweeney* v. *Ten Mile Oil and Gas Co.* (1889), 130 Pa. 193, where a sale had been effected by the plaintiff for the defendant company, but was not consummated, and the plaintiff brought action for his commission, Justice STERRETT, in giving judgment for the plaintiff, said: "The plaintiff procured a purchaser, to whom the company made a proposition of sale, and in good faith that proposition was accepted. That there was a failure to consummate the sale thus effected, was not the fault of the plaintiff."

In *Keys* v. *Johnson* (1871), 68 Pa. 42, Justice SHARSWOOD thus states the law: "When, being duly authorized to sell property at private sale, he has commenced a negotiation with a purchaser, the owner cannot, while such negotiation is pending, take it into his own hands and complete it either at or below the price first limited, and then refuse to pay the commissions." To the same effect, *Chillon* v. *Butler* (1851), 1 E. D. Smith (N. Y.) 150.

The question of the authority of the agent to sign the contract has been raised in defense to an action for commissions. Thus in *Ward et al.* v. *Lawrence et al.* (1875), 79 Ill. 295, the plaintiffs, real estate brokers, sought to recover commission under the following contract: "We have this day sold to Mr. Albert Price fifty-five acres of land, as follows: [here follows a description of the property] at four hundred dollars per acre, payable &c., &c." This contract was signed by the defendants and by the purchaser himself. It did not appear that the agents had any written authority to sign for the vendors. The sale fell through, owing to a dispute as to the quantity of the land, and the defendants re-sold to another purchaser through another agent, whose commission they paid. Justice SHELDON, in delivering the opinion, said: "Although the contract of sale was not binding upon Ray and Ward [the defendants], there being no authority from them in writing, yet, if they had verbally authorized the making of the contract, and Price [the purchaser] was willing to abide to it, the commissions would have been earned."

It has also been contended that where property has been placed in the hands of several brokers for sale, to the knowledge of them all, any one of them assumes the risk of having his claim to compensation defeated by a sale made by another broker before he procures a purchaser. This is shown by the recent case of *Brand* v. *Merritt et al.*, decided in the Supreme Court of Colorado, November 7, 1890, where the property was sold by another agent prior to the negotiation of the plaintiffs' sale. According to the evidence, however, in this case, it appeared that the sale, which the owner contended defeated the plaintiffs' right to recover, depended solely upon the purchaser's conclusions concerning the title; and that notwithstanding this fact, he gave the plaintiffs no notice whatever of the pending

sale, and permitted them to continue their efforts in his behalf. In reply to the defendant's contention, above stated, BISSELL, C., in affirming plaintiffs' judgment, said; "It is wholly unnecessary to determine the accuracy of this legal proposition, for the Court has found as a matter of fact, that no such sale was made prior to the time the plaintiffs found a purchaser ready, able and willing to purchase upon the specified terms, and notified the owner." With reference to the question of notice of the intended sale by the owner himself, he remarked: "They [plaintiffs] were * * fully justified in believing the agency still to exist, and the owner will be held to the full responsibility of its continuance, unless he be able to demonstrate satisfactorily that the sale, which in law is to be held to terminate it, was in fact consummated before the brokers found a purchaser and earned the commission."

A further objection has also been taken to the agent's right to recover, because the power only authorized him to procure a purchaser, and not to sell the property. This was the defendant's contention in *Fiske et al.* v. *Soule*, decided in the Supreme Court of California, December 31, 1890, where the plaintiffs were employed by the defendant to sell certain lands at a certain price per acre without the crops, or a certain other sum with the crops, the commission to be any sum they could get above those figures. A purchaser was procured, without reservation of the crops, but the Court found that the sale was for a less price than authorized. The purchase money was tendered, and a deed presented for execution containing no reservation. No objection was made by the defendant. He afterwards refused to execute the deed and pay the commission, not on the ground that the deed was not in proper form, or on the ground that the sale was not in accordance with the authority given by him, but that the plaintiffs had no authority to sell, only to procure a purchaser; that the contract was not within the power of the plaintiffs, because it required the defendant to convey by general warranty against all incumbrances, and that the plaintiffs were not entitled to recover until the money was paid. The opinion was delivered by Justice WORKS, and in answer to the defendant's contentions, the Court held that: "It is wholly immaterial in this case whether the power of the plaintiffs was to sell or merely to procure a purchaser. They complied with their part of the contract. If the defendant did not see proper to convey to the purchaser they had procured, this was no reason why he should not pay their commissions. It is immaterial that the plaintiffs in their complaint construed and treated this as a power to sell, even conceding that it was not." In reply to the contention that the plaintiffs were not entitled to recover until the purchase money was paid, he remarked: "It may be conceded that this would be so if the purchaser had failed to pay the purchase money, but the defendant could hardly defend on this ground, when the purchase money was not paid, owing solely because he refused to accept it."

The case of *Stewart* v. *Mather*

and another (1873), 32 Wis. 344, raised a point of considerable importance, and one upon which there are not many authorities. It was this: Is an agent employed to find a purchaser, who purchased the property jointly with another party, entitled to his commission? In the present case the agent had introduced the third party as a person wishing to buy, but there was no concealment, the defendants being fully informed of the facts, and the negotiations resulted in a sale to the agent (the plaintiff) and the third party. In the opinion of the Court, Chief Justice DIXON states: "The general principle will at once be acknowledged, that a person cannot at the same time be both agent for the seller to make the sale, and purchaser of the property to be sold. The relations are wholly incompatible with each other, and cannot be combined in the same person. The law will not permit it. Assuming the character of purchaser, the person so acting necessarily abandons that of agent, and can claim nothing in the latter capacity in his negotiations with his former principal. Such is the undoubted general rule. But the question presents itself, whether there may not be exceptions growing out of the peculiar nature of the agency, or certain special or limited agencies not falling within the reason of the rule, and so not within the rule itself. The reason of the rule is very plain. It is, that the interest of the party as purchaser, being adverse to that of his principal, supposing the agency still to continue, might, and most naturally and ordinarily would, lead to a violation of his duty as agent. If a case be presented, however, not within the reason of the rule, as of an agency limited to a time anterior to the purchase, or where the agency may be said to have expired, or the duties to have been performed, before the purchase takes place, to such a case it is presumed the rule would be held inapplicable. * * The general rule is, that a person cannot be agent for both purchaser and seller, and earn a compensation from each. The reason of this rule is the same as that for the other, which, in general, forbids the agent or broker from becoming the purchaser. But to this rule an exception arises whenever the reason fails. If the agency or office of the broker is merely to procure an interview between his two constituents or principals, who themselves negotiate and conclude the sale or exchange, the broker is entitled to his customary compensation from each. Not himself negotiating between or for either of the parties, nor in any degree influencing them to make the trade, it is immaterial that each was ignorant that he was acting for the other, and the broker will be entitled to his commissions from each." In support of his contention, he cited *Mullen* v. *Keetzleb and Lampton* (1870), 7 Bush. (Ky.) 253; *Rupp* v. *Sampson and another* (1860), 16 Gray (Mass.) 398, and *Herman* v. *Martineau* (1853), 1 Wis. 151, and continued: "The decisions tend very strongly to sanction the rule, that where the broker merely engages to find a purchaser at such price as may be agreed upon, if he presents himself as such purchaser, and the seller, with full knowledge of that fact, so receives and enters into negotiations with him, and a sale is consummated, the broker may

recover his commissions. But the proof in such case should be clear and the knowledge and intent of the seller satisfactorily established in the mind of the jury."

The question was raised in Pennsylvania in the case of *Tower and Ward* v. *O'Neil* (1871), 66 Pa. 332, where the plaintiffs were authorized by the defendant to sell certain land within a fixed time, upon a fixed commission. Before the expiration of the time limited for the sale, the defendant wanted to withdraw the authority, whereupon one of the plaintiffs said he would purchase himself. His offer was not accepted, and the parties afterwards came to a different arrangement, the authority being delivered up and a certain compensation paid the plaintiffs. The question raised was, whether the offer of Ward to take the property, which he and his partner were authorized to sell, was or was not a sale under the power. The Court below held that it was not, public policy denying the right of an agent to sell to himself. The plaintiffs contended that this was erroneous, and that the rule of law which forbids an agent to sell to himself, or several joint agents to sell to one of their number, had no application to the case. Justice WILLIAMS, in the opinion, says: "The plaintiffs were authorized to sell the property * * and for their services in making the sale the defendant agreed to pay them a commission * * and the additional commission of all that they might sell the property for above the sum [named]. As the price which the defendant was to receive for the property was fixed and limited by the stipulations contained in the power of sale, irrespective of the amount for which it might be sold, the plaintiffs insist that, without any violation of the policy of the law, either of them had the right to purchase the property on the same terms they were authorized to sell it to a stranger, and that the offer of one of them to take it on these terms was equivalent to a sale under the power, and entitled them to the commission which the defendant agreed to allow. But it seems to us that the question mainly discussed in the oral and printed agreement, whether this case comes within the rule of law, which forbids an agent to sell to himself, does not properly arise under the evidence. * * It is clear that the offer, under the circumstances in which it was made, cannot be regarded as equivalent to a sale of the property under the power. It was not so intended or understood by the parties at the time it was made. There was no tender of the purchase money, nor was anything done by the plaintiffs, or either of them, in pursuance of the offer, to put them in a position to treat it as equivalent to a sale under the power. On the contrary, they voluntarily surrendered the power of sale, and accepted the money tendered by the defendant as a compensation for the services they had rendered. But if the offer to take the property was made in execution of the power of sale, as contended by the plaintiffs, the defendant was under no obligation to accept it, and his refusal of it did not render him liable for the commissions he agreed to pay for selling the property. The relation between the parties, under the power of sale, was that of principal and agent, and it could not be changed into that of vendor and vendee

without the consent of the defendant. Under no aspect of the case, therefore, were the plaintiffs entitled to recover anything beyond compensation for the services they rendered."

The same principles apply to a broker employed to find or procure a loan of money, for in *Peet* v. *Sherwood and another* (1890), 43 Minn. 447, Justice COLLINS said: "The rights and duties of a broker employed to secure a loan depend upon the same principles which govern the broker who undertakes so find a purchaser of property, and no substantial distinction can be made. The inquiries in each case are, what did the broker undertake to do? Has he completed his undertaking? And, if not, is the difficulty and failure attributable to his own act, or that of the party by whom he was employed? The loan broker is entitled to his commissions when he has procured a lender who is ready, willing and able to lend the money upon the authorized terms. This done, his duty is performed, and he is entitled to compensation whether the loan is consummated or not, unless his right thereto is, by special agreement, made to depend upon conditions which the law does not annex to his engagement as a broker. He assumes no greater or different obligation in respect to title in case of a loan than when employed to make a sale. The borrower, when employing a broker to procure or make a loan for him, always does so upon the implied conditions (if there is no express stipulation in respect to the matter) that he has the ability and will make a tender to the lender a title free from infirmity. It is not the broker's duty, and no part of his engagement to remove incumbrances, or to cure defects in title, and, if the loan is not effected in conveyance of an incumbered or defective title, he is entitled to his commissions. He has performed the contract; the default is with the other party."

In the recent case, *Squires* v. *King*, decided in the Supreme Court of Colorado, September 12, 1890, the defendant instructed the plaintiff to procure him a loan, for which he offered to pay the plaintiff a commission. The plaintiff found the money, but the defendant, on being informed that it was ready for him, refused to receive it, alleging as his reasons, a change of mind as to the rate of interest, a discovery that he could not invest it as soon as he had anticipated, and a resolve on his part that he did not want the money. The Court, however, found that there had been a valid contract entered into between the parties, that the money had been procured by the plaintiff, and gave judgment for the commission.

The learned reader must not, however, lose sight of the fact that under the Statutes of some of the States, California, for instance, the broker must have a written contract with his principal or he cannot claim any commission. Want of space forbids an examination of the Statutes of the States thereon, as well as of the question of commissions, and of the rights of the broker, in cases where he purchases the property himself.

[The usual contract between the broker and his principal is to procure a purchaser: 26 AMERICAN LAW REGISTER 545.

The general principles of law to be gathered from this annotation, show that the broker must in every instance comply with the terms of

the original contract (page 119). This is exemplified by the California (119, 120), Connecticut (120), Missouri (125) and New York (119) cases; and it makes no difference whether the broker's contract be to procure a purchaser, or to effect an exchange of property (120). [So stated in 26 AMERICAN LAW REGISTER 556.

He must, in every instance where his contract is to procure a purchaser, prove that he has produced a person able, ready and willing to complete the purchase in every respect, according to its terms and conditions, and that it was through his efforts, upon his introduction, that the sale was effected, or in other words, that he was the *causa causans* (121). This doctrine is established by the decision of the Supreme Court of the United States (121), and by the decisions of the Courts in Alabama (121), California (136), Colorado (141), Illinois (121, 122, 139), Indiana (131), Iowa (123), Kansas (129), Kentucky (131), Michigan (124), Minnesota (124), Missouri (124, 125), Nebraska (143), New Jersey (125, 143), New York (126, 127), Texas (127) and Wisconsin (128). [Also *Doonan* v. *Ives* (1884), 73 Ga. 295, abstracted in 24 AMERICAN LAW REGISTER, 341, and leading article in 26 Id. 547.

The Maryland decisions, which are considered on page 128, appear to create a somewhat different rule, that the purchaser must complete the sale; that he must be a party capable, and that he must ultimately become in fact the purchaser. These decisions have very recently been considered by the Minnesota Court as not very seriously antagonistic to the general principle above stated (124).

It is not necessary that the broker should carry out the negotiations, where his contract is merely to produce a purchaser. The mere fact of his introducing the parties without further action on his part, is sufficient, provided the person so introduced actually contracts for the purchase of the property. This is the ruling of the Courts in Arkansas (135), Pennsylvania (121) and Tennessee (139). If the person so introduced enters into a binding contract with the owner, his commission is fully earned: Minnesota (124).

It is absolutely necessary, however, that the party introduced must purchase on the broker's introduction, for if such person merely makes an offer, which is not accepted, and the owner afterwards, either alone or through the instrumentality of another broker, effects a binding contract with the same person, the broker having taken no further steps to bring the parties together and effect a sale between them, the broker cannot recover his commissions (122).

So the broker's acts must not be one of a chain of causes or events that ultimately lead to the sale (129). He must also show that the purchaser made a clear acceptance of the offer at the time, or he cannot be said to have produced a purchaser. He must obtain a consent to a definite proposition (124). [Especially when the owner sells after changing his terms: 26 AMERICAN LAW REGISTER 560.

The introduction, however, need not be a personal one, provided it be proved that the purchaser was induced to apply to the owner through the means employed by the broker (126, 127).

If he can prove all this, he has

procured a purchaser, even though the sale is not completed or executed by the payment of the consideration to the vendor (124). The mere signing of a binding contract between the parties is a sufficient finding of a purchaser, although no formal deed is executed or delivered (129). But the contract between the broker and his principal, may be so worded as to bar his right to recover, until the sale is completed or consummated by the transfer of the property, and the payment or securing of the purchase money (129, 130). And if the broker's right depends upon a special contract, it must be proved that he has performed it (123, 131).

The same ruling applies to the case of a broker engaged to effect an exchange of property. He must perform his contract, and show that an exchange was effected by the meeting of the minds of the parties (120, 121, 123).

Where there has been a valid contract entered into between the vendor and the purchaser, which the latter has refused to complete, and the former has seen fit to release him from his obligation, the Courts have in some instances held that the vendor cannot on this ground avoid payment of the broker's commissions (130). This has been held to be the law in Illinois (133), Indiana (130), Kentucky (131), Missouri (132) and Wisconsin (133); and even in the case of an exchange in Connecticut (132). [*Delaplaine* v. *Turnley* (1878), 44 Wis. 31, and *Lane* v. *Albright* (1874), 49 Ind. 275, abstracted in 17 AMERICAN LAW REGISTER 670, and 15 Id. 53.

Where, however, the terms of the sale as given to the broker, are simple and specific, and are agreed to by the purchaser, but subsequently are unsuccessfully sought to be substantially changed by him, the broker cannot recover, certainty in the offer to fulfill being as important to the vendor as in the terms of the sale to the vendee. This was decided by the Supreme Court of the United States (134).

The broker is also entitled to his commissions, where the purchaser is in the first instance introduced to the seller by the broker, but no contract is effected at the time, if the vendor subsequently sells to such party upon such introduction, and the broker was the procuring cause of the sale. This is declared to be the rule in Arkansas (135), Illinois (136), Kansas (137) and Tennessee (138). [The principle may be otherwise stated that after the termination of the contract between the broker and the owner, no commissions are recoverable: 26 AMERICAN LAW REGISTER 551, 553.

So where the principal has himself effected a sale within the time specified, he has been held liable for the broker's commissions, in Colorado (144), New York (136), Massachusetts (137) and Pennsylvania (144). [See also 26 AMERICAN LAW REGISTER 554, 561.

Neither can the principal by his own acts, or through a defect in the title which is unknown to the broker, defeat the latter's right to his commissions. This doctrine is established by the Supreme Court of the United States (139), and by the decisions of the Courts in Alabama (140), California (140), Colorado (141), Minnesota (142), Nebraska (143), New Jersey (143), New York (143) and Pennsylvania (144). [See also 26 AMERICAN LAW REGISTER 555, and *Barnard* v. *Monnot* (1866), reported in full

in 6 AMERICAN LAW REGISTER 209; S. C., 1 Abb. Ct. App. Dec. (N. Y.), 111.

So the principal cannot avail himself of the want of authority on the part of the agent to sign the contract, where there is a verbal authority, and the purchaser is ready to abide by it (144).

Where the property has been placed in the hands of several brokers with full knowledge, they assume the risk of a sale by any one of them, but only one of them is fully justified in believing the agency to exist, unless the principal can demonstrate satisfactorily that a sale was in fact consummated before the purchaser was found by the broker (144, 145). And where the purchase money has been paid, the principal cannot object to the payment of the commissions on the ground that the broker's authority was only to procure a purchaser, and not to effect a sale: California (145). [Similarly: 26 AMERICAN LAW REGISTER 563.

The broker has also been held entitled to recover where he has made the purchase jointly with a third party: Wisconsin (145). Want of space, however, forbids a full examination of this phase of the question. [See also 26 AMERICAN LAW REGISTER 565.

The rights and duties of a broker employed to secure a loan depend upon the same principles which govern the broker who undertakes to find a purchaser. He is entitled to his commissions when he has procured a lender who is ready, able and willing to lend the money upon the terms authorized, and having done so, it matters not whether the loan is consummated or not, unless there be a special contract. In such cases the borrower impliedly stipulates that he has a good title: Minnesota and Colorado (148), and 26 AMERICAN LAW REGISTER 545.

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[*Hamlin* v. *Schulte* (cited in the preceding annotation, page 124) is also reported in full in AMERICAN LAW REGISTER for February, 1887 (vol. 26, N. S., page 106), with an annotation discussing the two principles upon one of which all the suits for commissions are based; namely, *first*, that the placing of the property with the broker is sufficient, or *second*, that there must be a sale actually consummated. The second view is characterized by the annotator as "obviously illogical and unjust," because the broker's undertaking is not to make a complete sale. The force of this objection has been apparent, and the principle now appears to be modified to the extent of giving the commissions if the failure of the sale can be charged against the vendor. The subject had been previously discussed in a brief note to *Lincoln* v. *McClatchie* (1868), 10 AMERICAN LAW REGISTER 634; S. C., 36 Conn. 136.

The broker was not allowed to represent both parties, in *Orton* v. *Scofield* (1884), 61 Wis. 382; *Bell* v. *McConnell* (1881), 37 Ohio St. 396; *Scribner* v. *Collar* (1879), 40 Mich. 375; *Fish* v. *Leser* (1873), 69 Ills. 394; and *Raisin* v. *Clark* (1874), 41 Md. 158. Abstracts of these cases appear in 23 AMERICAN LAW REGISTER 799; 21 Id. 136; 18 Id. 389; 15 Id. 248, 61.

This branch of the subject received attention in a note to *Lynch* v. *Fallon* (1876), and *Bollman* v. *Loomis* (1874), reported in full in 16 AMERICAN LAW REGISTER 331, and 15 Id. 75; S. C., 11 R. I. 311, and 41 Conn. 581. Other cases are collected and reviewed in 26 Id. 562.

The broker is not put to the trouble of obtaining definite terms between the seller and buyer. See *Veazie* v. *Parker* (1881), 72 Me. 443; abstracted in 21 AMERICAN LAW REGISTER 69, and leading article in 26 Id. 565.

The broker's duty of faithfulness to his employer was upheld in *Young* v. *Hughes* (1880), 32 N. J. Eq. 372, and *Hughes* v. *Young* (1879), 31 Id. 60; abstracted in 19 AMERICAN LAW REGISTER 582, and 18 Id. 788. Other cases are considered in 26 Id. 564. J. B. U.

LEGAL NOTES.

STATE REPUDIATION.—It seems to me that the problem referred to by A Jurist (*ante*, page 15) is extremely simple. A State cannot impair the obligations of a contract: a State cannot be sued. These two somewhat antagonistic rules, work the apparent contradiction in which A Jurist seems to think the Court has fallen. But while it is an anomaly in municipal law to start with creating a rule, and at the same time withdraw all power to enforce it, in this particular case we have not done this; we have laid down a very wise, universal rule, and prohibited a particular mode of enforcing it. Nor is there wanting analogy in the law for private persons. A contract after six years is no ground for a suit, or rather the debtor is suable or not at his mere option. Is the contract obliterated? Certainly not. It remains for every possible purpose, saving that of being enforced by a suit against the contractor. It sustains a pledge, for example. Remove the obstacle of the statutory prohibition, and the contract has the same force as it had on the day of the breach: and this may be done by the State or by the party.

Precisely analagous, but with much greater scope, is the effect of the rules in respect of contracts with the State. The State is as powerless to destroy the contract or to take from it any incident as is a private person or corporation. It differs not from many persons in freedom from compulsion in respect to its contracts (married women at common law, infants, ambassadors, and probably others), but the contracts remain. But is capacity to compel performance, the only incident of contract? Is not freedom from duty otherwise compulsory, an important thing? Is not the right to discharge an obligation important? Is not the power to enforce a right as against all men, even though agents of the State, important; even though the State cannot be made a defendant or its property taken in execution? All these incidents of a contract remain and can be inferred, and cannot be limited or restricted by the State. Possibly the framers of the Constitution had not in their minds the humiliating conception of a State inducing the citizen to pay his money, and then destroying his right to the thing purchased, if it was in the form of an executory obligation of the State. They certainly contemplated bring-